91-720

Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

JOHN S. TRINSEY, JR.

Petitioner

versus

COMMONWEALTH OF PENNSYLVANIA, et al.
v.
THE SENATOR ARLEN SPECTER, et al,
Intervenors in DC, Appellants in 91-1490
Commonwealth of Pennsylvania, et al.,
Appellants in 91-1491

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Petitioner Proceeding Pro Se

QUESTIONS PRESENTED FOR REVIEW

1. Was not the District Court by the Honorable Edward N. Cahn, Judge, correct in issuing the subject Order, (App."E" & "F") dated June 10, 1991, entered June 11, 1991 in protecting the Constitutional right to vote of Petitioner John S. Trinsey, Jr., ("Trinsey"), as well as the 5.5 million Pennsylvania Rank and File Members of the Republican and Democratic Party with regard to the Senator John Heinz vacancy as to their right to nominate their respective Party's Standard-bearer?

2. Under the 17th Amendment to the Constitution who has the power to nominate and select a Republican Party or Democratic Party Candidate for a United States Senate vacancy, the Rank and File Party Members or the Party Elite:(The Party Bosses through the State Legislatures)?

3. Did the Lower Court error in

finding that the Supreme Court of the United States under the Seventeenth Amendment, views the manner in which the nominees for a United States Senate vacancy are selected to have been left to the discretion of the States without regard to any Constitutional Rights a Republican or Democratic Party Member may have under the 17th, 14th, and 1st Amendments?

4. With regard to the Commonwealth of Pennsylvania election scheme does not the Lower Court's Opinion of the Court, Judgement and mandate of August 6, 1991, disfranchise Petitioner as well as the more than 5.5 million Pennsylvania voters, the Rank and File Members of the Republican and Democratic Party from nominating and selecting their respective Party's choice to access the ballot for the November 5, 1991 Special Election to fill the vacancy left by the tragic death of Senator John Heinz on April 4, 1991?

5. Did the Lower Court, Three Judge Panel, error by it's Judgement entered August 6, 1991, when that Court found that the prior Judgement Order entered June 11, 1991, by the Honorable Edward N. Cahn, Jr. is reversed and rescinded and the cause is remanded to the said District Court with direction to enter Judgement for all Defendants and against John S. Trinsey, Jr., and further Ordered that the Mandate issue forthwith?

6. Did the three Judge panel error in issuing it's Mandate entered August 6, 1991?

7. Did the said District Court error by it's Order dated August 7, 1991, and filed August 9, 1991, which complied with the Mandate and Ordered that the prior Judgement Order in the within case is rescinded and Judgement is entered in favor of all Defendants and against Trinsey?

8. Did the Lower Court Three Judge Panel error by it's Order dated and entered August 13, 1991 which denied Trinsey's August 7, 1991 Petition for Rehearing, and Amended Petition for Rehearing and Recall of Mandate?

9. Did the Lower Court in Banc error in denying Trinsey's Petition for Rehearing?

10. Should not all said Orders of the Lower Court, including the said District Court's Order dated August 7, 1991, and entered August 9, 1991 in obedience to the Lower Court's mandate, be rescinded, reversed and/or otherwise set aside so that the Judge Cahn's Judgement be affirmed?

11. Was not Trinsey entitled to a Stay of the subject Pennsylvania United States Senate vacancy Special Election scheduled for November 5, 1991 between Harris Wofford and Richard Thornburgh?

12. Should not the Pennsylvania United States Senate vacancy Special Election held November 5, 1991 be set aside as illegal, null and void and/or otherwise be set aside so that a legitimate primary be permitted in Spring 1992 so that 5.5 million Pennsylvania Republican and Democratic Party Faithful along with Trinsey can exercise his/her rights to nominate and vote for his/her party choice to access the Special Election, and further be allowed to obtain 2000 valid signatures to access said Primary Ballot as a candidate to fill the vacancy of the late Senator John Heinz?

13. Is not the Mandate of the Seventeenth Amendment so manifestly clear that the People have the power to fill a United States Senate vacancy by election that no torturing of the language "as the legislature may direct" can justify removing the election power from the People and giving the power to the State's legislature?

14. Is not the Lower Court's reversal of Judge Cahn's Judgement so clearly erroneous that this Honorable Court has a duty to rescind and reverse the Lower Court in a summary judgement fashion by Trinsey's request and/or Sua sponte?

15. Is not Trinsey, along with the subject 5.5 million Pennsylvania Republican and Democratic Party Faithful entitled to a 1992 Spring Special Senate vacancy Primary with the winners to face off on the 1992 Fall Special Election just as Judge Cahn proposed and should not the Supreme Court of the United States promptly issue such a Mandate?

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8/6/91 "A" OPINION (Sloviter, Chief Judge, Greenberg and Seitz, Circuit Judges), filed. (bj) [91-1490 91-1491] App. 21

8/6/91 "B" JUDGMENT: REVERSED and remanded to D.C. with direction to enter judgment for the defendants. It is further ordered that the MANDATE issue forthwith. Each party to bear its own costs, filed. (bj) [91-1490 91-1491] App. 53

8/6/91 "C" MANDATE ISSUED, filed. (bj) [91-1490 91-1491] App. 55

8/13/91 "D" ORDER filed, (Sloviter, Chief Judge, Authoring Judge) denying Trinsey's motion to recall mandate. (cvs. 91-1490/91) (bj) [91-1490] App. 58

8/15/91 "E" ORDER filed, (Sloviter, Authoring Judge, Chief Judge, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica, Cowen and Nygaard, Circuit Judges) denying Trinsey's petition for in banc rehearing. (cvs. 91-1490/91) (bj) [91-1490] App. 59

"F" OPINION - Judge Cahn granted plaintiff's request for declaratory judgment declaring 25 Pa. Cons. Stat. Ann § 2776 unconstitutional because it operates to abridge the right to vote of the citizens of the Commonwealth of Pennsylvania. App. 61

(Appendix continued ...)

(... Appendix continued)

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"G" ORDER 6/10/91 entered 6/11/91 Declare 25 Pa. Cons. Stat. Ann § unconstitutional. App. 95

"H" ORDER - RESCIND - Judge Cahn 8/7/91 entered 8/9/91 in obedience to Lower Court's mandate: prior judgment is rescinded and judgment is entered in favor of all defendants and against John S. Trinsey, Jr. (petitioner herein). App. 97

On Appeal from the United States
District Court for the Eastern District
of Pennsylvania
(D.C. Civil No. 91-02749)

Argued July 15, 1991

Before: SLOVITER, Chief Judge
GREENBERG and SEITZ, Circuit Judges

(Opinion filed: August 6, 1991)

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OPINIONS AND ORDERS BELOW TO BE REVIEWED

Lower Court

1. The Opinion of the Court, United States Court of Appeals for the Third Circuit, a Panel of Three Judges, dated and entered August 6, 1991, which advised that the District Court Judgement was reversed and remanded with directions to enter Judgement for the Defendants and that the mandate shall issue forthwith. (App."A",App.21).

2. The Judgement of the Court, United States Court of Appeals, Panel of Three Judges, dated and entered August 6, 1991 that a mandate is issued that it is Ordered that the Judgement of the said District Court entered June 11, 1991, be, and the same is hereby reversed and the cause is remanded to said District Court with direction to enter Judgement for the Defendants, and further that the mandate of

this Court shall issue forthwith, all in accordance with the Opinion of this Court. (App."B",App.53).

3. The Mandate issued August 6, 1991 (App."C", App.55).

4. The Order dated and entered August 13, 1991 by Chief Judge, Authoring Judge, denying Trinsey's Motion to Recall Mandate. (App."D", App.58).

5. The Order dated and entered August 15, 1991 by Court in Banc denying Trinsey's Petition for in Banc Rehearing. (App."E",App.59).

District Court

6. The Opinion of the United States District Court for the Eastern District of Pennsylvania by the Honorable Edward H. Cahn, ("Judge Cahn"), dated June 10, 1991 and entered June 11, 1991, which John S. Trinsey, Jr.'s ("Trinsey"), request for a Declaratory Judgement was granted and the Court Ordered that 25 PA. Cons. Stat.Ann.

§2776 unconstitutional because it operates to abridge the right to vote of the citizens of the Commonwealth of Pennsylvania.(App."F", App.61).

7. Declaratory Judgment Order dated June 10, 1991 and entered June 11, 1991. (App."G", App.95).

8. The Order by Judge Cahn dated August 7, 1991, and entered August 9, 1991, in obedience to the mandate to rescind. (App."H", App.97).

JURISDICTION

DISTRICT COURT

1. In the United States District Court for the Eastern District of Pennsylvania at Civil Action No. 91-2749.

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 (1988).

LOWER COURT

2. In the United States Court of Appeals for the Third Circuit at Nos. 91-1490 and 91-1491.

This court has jurisdiction over the appeal from the final decision of the district court issuing a declaratory judgment pursuant to 28 U.S.C. § 1291 (1988). The issue before us is one of law and our review is plenary.

HIGH COURT

3. Before the Supreme Court of the United States pursuant to 28 U.S.C. § 1254(1).

TABLE OF AUTHORITIES

STATUTES

25 Pa. Cons. Stat. Ann. § 2776..Passim

CONSTITUTIONAL PROVISIONS

U.S. Constit. amend, XIV.....Passim

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2. United States v. Classic, 313 U.S. 299 (1941).....Passim

3. Valenti v. Rockefeller, 292 F. Supp. 851 (S.D.N.Y. 1986), aff'd, 393 U.S. 405 (1969).....Passim

4. Rivera-Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982)....Passim

5. American Party of Texas v. White, 415 U.S. 767, 781 (1974).....Passim

STATEMENT OF THE CASE

On April 4, 1991, when the tragic air crash took the life of Pennsylvania's United States beloved Senator John Heinz a vacancy was created in the United States Senate.

Accordingly the Petitioner herein John S. Trinsey, Jr., ("Trinsey"), (a/k/a/ "Jack Trinsey"), age 64, a qualified worker, supporter and elector of the Republican Party who voted in every election in the past 33 years, missing only one General Election and eight Primaries, sought to first, have the right to vote in a Special Election Primary to use his Constitutional rights to vote for his choice as Republican Party Nominee to access the Special Election Ballot for United States Senator, and secondly, have the right to obtain 2000 valid signatures of Republican Party Electors so that Trinsey could access the Republican Party Special Primary so as to give the 2.5 million Republican Party Rank and File Pennsylvania Members an opportunity

to hear Trinsey on the issues and determine for themselves just who they should nominate as the Party's choice to be the Standard-Bearer.

When Trinsey attempted to obtain a Primary Petition from the State Election Bureau he was advised no Primary would be held, that the respective Party Committees would have exclusive rights to select the nominees, as set forth in Pennsylvania's Election Scheme: 25 Pa. Const. Stat. Ann § 2776.

Trinsey immediately saw Section 2776 as an unlawful power grab by the Party Bosses and sought relief in the Federal District Court in Philadelphia (Civil Action No. 91-2749 U.S.D.C., E.D.Pa.)

By Opinion and Order dated June 10, 1991 and entered June 11, 1991, the District Court, by the Honorable Edward N. Cahn ("Judge Cahn"), Trinsey's request for a declaratory judgement was granted declaring Section 2776 unconstitutional because it operates to abridge the right to vote of the

citizens of the Commonwealth of Pennsylvania.

An Appeal followed as the Commonwealth of Pennsylvania et al and the Intervenors, Senator Arlen Specter, Republican and Democratic State and National Committees and Members et al, all ganged up on Trinsey in an Appeal to the Third Circuit.

The bottom line is that the Third Circuit reversed Judge Cahn and restored Section 2776 which allowed the Special Election to be scheduled November 5, 1991 between Senator Harris Wofford, the Governor's temporary appointment and also the Democratic Committee Nominee and, Mr. Richard Thornburgh, the Republican Committee Nominee.

Trinsey seeks by this petition to have the Lower Court reversed, Judge Cahn's Order affirmed and to still further set aside the subject November 5, 1991 Special Election and finally, Trinsey seeks a mandate from this Honorable Court that a Special Election

Primary be held in conjunction with the 1992 Spring Primary with the winners to face off in the 1992 Fall General Election, along with any other Party's and/or person(s) who access the ballot.

Trinsey was denied a Stay by Justices Souter, Marshal, and O'Connor, and Trinsey will keep renewing his stay requests to all Justices.

Trinsey hereby incorporates in full the Appendix in this instant filing, which show the Lower Court and District Court Orders and mandate to be reversed and/or rescinded and/or otherwise set aside. Being Appendix, "A", "B","C","D","E" and "H".

The Opinion and Order which Trinsey seeks restored and affirmed are Appendix "F" and "G".

ARGUMENT:

REASONS WRIT OF CERTIORARI SHOULD BE GRANTED

In this matter the United States Court of Appeals for the Third Circuit at Nos. 91-1490 and 91-1491 has decided in error an important question of Federal Law which has not been, but should be settled by this Honorable Court, to wit: a fundamental voter rights issue: the Lower Court decided that under the Seventeenth Amendment to the United States Constitution the manner in which nominees are selected to access a special election ballot to fill a vacancy in the United States Senate have been left to the discretion of the States without regard to the Constitution voting rights of the Democratic and Republican Party Rank and File Members, in this case some 5.5 million Pennsylvanians, and further the Lower Court erred in not reading the Section of the Seventeenth Amendment that mandate's the

people shall fill the vacancy by election, all as set forth in Judge Cahn's Opinion.

And still further, once the Lower Court settled the aforementioned question, it relied on this holding to determine that Trinsey and the subject 5.5 million Pennsylvania Party Faithful have no equal protection right to vote under the Fourteenth Amendment, because all of Pennsylvania's citizens are deprived of the opportunity to vote in a vacancy primary, citing the Supreme Court's decision in Rodriguez v. Popular Democratic Party 457, U.S. 1 (1982) 457 U.S. at 10, 14.

The Lower Court held in effect that the States have the sole discretion to determine the manner in which the subject nominees are to be selected even if all 5.5 million Pennsylvania Republican and Democratic Party Faithful are disfranchised in the selection of the respective Party's nominee, a privilege, as the Lower Court sees it, exclusively given under rules of the major

political parties to the members of the parties state committees, even though the Lower Court fails to cite which Party Rules it relies on to reach this conclusion, Rules that Trinsey cannot find in the Republican Party Rules as no such Rules were produced in said Lower Court record. In the Democratic Party Rules submitted on record no such rule can be found which allows the Democratic Party Committee to disfranchise it's Party Members to participate and vote for said nominee, and the Lower Court cites none.

Judge Cahn's June 10, 1991 Opinion covers this point so well that Trinsey relies on Judge Cahn's Opinion.

The Lower Court also held that primaries are not guaranteed by the Constitution, further Defendants/Intervenors argued that the word primary is not to be found in the Constitution, inferring that primaries are unconstitutional, an absurd conclusion.

Finally the Lower Court finds that Trinsey and the 5.5 million Party Faithful do not have a remedy under Constitutional Law however, if the voters of the State are unhappy with the legislature's decision, then the Democratic process gives them ample opportunity for redress: vote the legislatures out of office: but what about Federal Judges, if they chose to side with Party Bosses and hurt the People how does one get a chance to vote a Federal Judge out of office?

As a result of the Lower Court's decision less than 300 Republican Party Committee Members selected the Republican Party's nominee, Mr. Richard Thornburgh, leaving Trinsey and 2.5 million other Republican Party Faithful out in the cold: disfranchised. As a result of the Lower Court's decision less than 500 Democratic Party Committee Members selected the Democratic Party's nominee, Senator Harris Wofford, leaving 3 million other Democratic

Party Faithful out in the cold: disfranchised.

Pennsylvania's election scheme makes it impossible for any other Party, political body or independent to produce 43,305 signatures to access the subject ballot, and despite heroic efforts by these Pennsylvanians no other persons/party/political body have accessed the subject ballot save Wofford and Thornburgh, two lawyers no less: the Lower Court has forced Pennsylvania voters to choose between two officers of the Court. The Lower Court is welding political power in this matter, and it is in violation of the Constitution.

Clearly, the Lower Court has erred as the clear mandate of the Seventeenth Amendment is that the people fill the vacancies by election as the legislature may direct.

The legislature may not then direct that the people, numbering more than 5.5

million be disfranchised so that less than 800 people have the right to disfranchise the other 5.5 million people of Pennsylvania.

What the Lower Court has done here is to take the power to vote for a United States Senate vacancy nominee out of the hands of the Republican and Democratic Party Faithful and place that power exclusively in the hands of the Party Bosses.

This is wrong, so wrong, such fundamental gross error that based on the record in this case, the Honorable Edward N. Cahn's Opinion and Order (Appendix "F" and "G" and the Lower Court's Opinion and Order, Judgement and Mandate Appendix "A","B", "C" and "D" "E" and the District Court Order Appendix "H") this Honorable Court should not only grant the subject petition for Writ of Certiorari but because the issue is such clear cut fundamental law, as set forth by Judge Cahn, that this Honorable Court, Sua sponte, or by request that is hereby

respectfully made by Trinsey that a summary judgement be hereby issued reversing and rescinding all Lower Court Opinions, Orders, Judgements, and Mandate, Appendix "A" through "H" along with Judge Cahn's Mandate obedience Order, Appendix "H", and further affirm Judge Cahn's Opinion and Order Appendix "F" and "G", respectively.

And finally, issue a mandate that Pennsylvania hold a special primary for subject nomination at the 1992 Spring Primary with the winners to face off in the General Election along with other candidates who succeed in accessing the subject ballot.

This Country is in a very bad condition caused by years of abuse by those in power.

The Federal Court should not be in politics: with this Country down to a close 2 vote split in the United States Senate the People cannot afford to have any person denied their right to select their choice of a United States Senate nominee.

The Supreme Court of the United States

has a solemn duty to free the People of Pennsylvania to vote for their Party's choice as United States Senate vacancy Standard-bearer in the Primary.

There is no other alternative but Primary in Pennsylvania's Election Scheme for the subject vacancy.

By this Petition Jack Trinsey has kept faith with the 5.5 million People of Pennsylvania, the Rank and File Members of the Republican and Democratic Party.

Trinsey protests in the strongest possible lawful fashion that he was forced to file this matter Pro Se because of the manifest injustice inflicted upon him by other action in these Courts whereby Trinsey was denied legal counsel and a right to trial by jury, and now denied his right to vote and/or be a United States Senate vacancy candidate: what is America coming to!

Petitioner Trinsey rests his case on Judge Cahn's Opinion and Order.

Judge Cahn was true to his oath to uphold the United States Constitution and Petitioner respectfully maintains that this Honorable Court has the solemn duty to affirm Judge Cahn's subject Opinion and Order dated June 10, 1991 if America is to be free.

CONCLUSION

For the foregoing reasons Petitioner respectfully requests that his Petition for Writ of Certiorari to the United States Court of Appeals be granted to review and properly Rule this case for the furtherance of justice and the preservation of the Constitution of the United States.

This 31 ST day of October, 1991.

Respectfully submitted,

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APPENDIX

Filed August 6, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-1490 and 91-1491

JOHN S. TRINSEY, JR.

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, BOARD OF ELECTIONS, THE GOVERNOR, SECRETARY OF THE COMMONWEALTH

ARLEN SPECTER, ANNE ANSTINE, WILLIAM H. LAMB, ELSIE HILLMAN, HERBERT BARNESS, THE REPUBLICAN STATE COMMITTEE OF PENNSYLVANIA,

Intervenors In DC

PENNSYLVANIA DEMOCRATIC STATE COMMITTEE, LAWRENCE J. YATCH, WILLIAM K. MYRTETUS, DON WALKO, BILLIE JO HERR and ANTHONY J. MAY,

Intervenors

Intervenors, Senator Arlen Specter, Anne Anstine, William H. Lamb, Elsie Hillman, Herbert Barness, and the Republican Committee of Pennsylvania,

Appellants In No. 91-1490

Department of State of the Commonwealth of Pennsylvania, Governor Casey and Commonwealth Secretary Christopher A. Lewis,
Appellants in No. 91-1491

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D. C. Civil No. 91-02749)

Argued July 15, 1991

Before: SLOVITER, *Chief Judge*,
GREENBERG and SEITZ, *Circuit Judges*

(Opinion filed : August 6, 1991)

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OPINION OF THE COURT

SLOVITER, *Chief Judge*.

I.

Facts and Procedural History

John Heinz, a United States Senator from Pennsylvania, died on April 4, 1991 in an airplane accident. A Pennsylvania statute, 25 Pa. Stat. Ann. § 2776 (Purdon 1991), sets forth the procedure which should be applied to fill a senatorial vacancy. That statute provides, *inter alia*, that the Senator's unexpired term is to be filled by a special election to be held at the time of the next general or municipal election occurring at least 90 days after the happening of the vacancy. The Governor is obliged to issue writs of election within 10 days after the vacancy happens.

The statutory provision of principal relevance to the issues in this appeal provides: "Candidates to fill vacancies in the office of United States Senator shall be nominated by political parties, in accordance with the party rules relating to the filling of vacancies, by means of nomination certificates . . ." to be filed at least 60 days prior to the special election. *Id.* The "political parties" who are entitled to nominate their candidates in this manner are those whose candidate for any office in the last general election received at least two percent statewide and two percent in at least ten counties of the largest vote cast in the state for any elected candidate. *Id.* § 2831(a). The Democratic and Republican parties are the only

parties which fit this definition at least at this time. Individuals or candidates of other political parties must satisfy the state's requirements as to nomination papers in order to appear on the ballot for the special election. *Id.* § 2911(a)-(d). Section 2776 provides that the Governor may make a temporary appointment to fill the vacancy until the special election.[1]

In accordance with that statute, the Governor of Pennsylvania, Robert P. Casey, issued a writ of election declaring a special election for November

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1. The full text of 25 Pa. Stat. Ann. § 2776, reads as follows:

> Whenever a vacancy shall occur in the office of United States Senator, said vacancy shall be filled for the unexpired term by the vote of the electors of the State at a special election to be held at the time of the next general or municipal election, occurring at least ninety (90) days after the happening of such vacancy, and it shall be the duty of the Governor to issue writs of election to the various county boards of elections and to the Secretary of the Commonwealth within ten (10) days after the happening of said vacancy. Candidates to fill vacancies in the office of United States Senator shall be nominated by political parties, in accordance with the party rules relating to the filling of vacancies, by means of nomination certificates, in the form prescribed in section 630 of this act; and by political bodies, by means of nomination papers in accordance with the provisions of sections 951, 952 and 954 of this act. Said nomination certificates and nomination papers shall be filed in the office of the Secretary of the Commonwealth at least sixty (60) days prior to the date of said special election. Until such time as said vacancy shall be filled by an election as herein provided, the Governor of the Commonwealth may make a temporary appointment to fill said vacancy.

5, 1991; on May 13, 1991, Governor Casey named Harris Wofford as a temporary appointment to fill the senatorial vacancy.

On April 29, 1991, John S. Trinsey, Jr. filed a complaint in the United States District Court for the Eastern District of Pennsylvania, alleging that he wishes to become a candidate to fill the vacancy caused by Senator Heinz's death, and asserting that section 2776 violates the Fourteenth[2] and the Seventeenth Amendments of the United States Constitution because it authorizes nominations of candidates to fill senate vacancies by political parties rather than by primary elections. He sought a declaration that section 2776 is unconstitutional. By motion, he sought injunctive relief directing that he and others be placed on the ballot at the November election, and that Wofford be restrained from serving as Senator and that the appointment be set aside. The defendants, the Commonwealth of Pennsylvania, the Department of State, Board of Elections, the Governor, and the Secretary of the Commonwealth, opposed Trinsey's request for preliminary relief and moved, *inter alia*, to dismiss the complaint for failure to state a claim and as barred by the Eleventh Amendment, U.S. Const. amend. XI.

The district court scheduled a hearing on the motion for preliminary injunction on May 29, 1991. No party offered evidence and instead the parties presented oral argument. Following

2. The complaint actually alleged violation of the Fifteenth Amendment, U.S. Const. amend. XV, but on oral argument before us Trinsey explained that he intended to refer to the Fourteenth Amendment, U.S. Const. amend. XIV, and we will so treat his complaint, as did the district court.

supplemental submissions on legal issues requested by the district court, the court denied both Trinsey's request for preliminary injunction and the defendants' motion to dismiss. It issued a final judgment on the merits declaring section 2776 to be unconstitutional, essentially on the ground that the statute violates the Seventeenth Amendment, U.S. Const. amend. XVII, because it does not provide for a primary election before the special election to fill a Senatorial vacancy.

The Commonwealth defendants appealed, as did Pennsylvania Senator Arlen Specter who, together with Republican Party officials and the Republican State Committee of Pennsylvania, had been given leave to intervene by the district court. On appeal, we granted leave to the Pennsylvania Democratic State Committee and its officials to intervene, and granted leave to the Committee of Seventy to file a brief amicus curiae. Because appellee Trinsey is appearing *pro se* and is not an attorney, it appeared to the court that the interests of informed decisionmaking required that the position adverse to that of appellants be fully and forcefully advanced, and we entered an order appointing Professor Laura E. Little as amicus curiae to present an appropriate response to appellants' position.[3] We expedited the appeal.

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3. The court expresses its appreciation to Professor Little for undertaking to provide her assistance and particularly for doing so within the severe time restraints imposed by our scheduling order.

II.

The District Court Opinion

The district court's analysis began with the undisputable proposition that the constitutional right of the citizens of Pennsylvania to vote for their national representatives has its foundation in the Qualifications Clauses contained in Article I of the Constitution, U.S. Const. art. I, § 2, cl. 2, and the Seventeenth Amendment. The Qualifications Clause of Article I applies only to the election of members of the House of Representatives[4] and thus is inapplicable here. Instead, we are concerned with the Seventeenth Amendment, which contains provisions, including the Qualifications Clause applicable to election of Senators, which were designed to replace the original constitutional provision for election of United States Senators by state legislatures[5] with a provision requiring popular election of Senators.

The district court analyzed the legislative history of the Seventeenth Amendment and numerous federal cases arising under the First, Fourteenth and Fifteenth Amendments. The district court stated that "the [Supreme] Court has recognized

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4. Article I, § 2, cl. 1 of the United States Constitution provides:

> The House of Representatives shall be composed of members chosen every second Year by the People of the several States and the Electors in each State shall have the qualifications requisite for electors of the most numerous Branch of the State Legislature.

5. The Constitution originally provided that the two Senators from each state were to be "chosen by the Legislature thereof." U.S. Const. art. I, § 3, cl. 1.

that the Constitution guarantees the franchise at all stages of the electoral process, including the nomination stage." Typescript Op. at 9. The court noted that the right to vote is fundamental and is protected against private as well as state interference. The court recognized, however, that the issue whether the right to vote must be protected at the nomination stage has not been squarely presented before. Indeed, it concluded from the Supreme Court precedent that "[i]t is clear that the states could choose to run general elections [without] the prior selection of major political party nominees by primary or otherwise." *Id.* at 6 (citing *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 218 (1986)). Nonetheless, it held that "precedent requires popular participation at the nomination stage" preceding a special election to fill a Senatorial vacancy, apparently because Pennsylvania had chosen to use the primary system for selection of nominees by political parties in its general elections. *Id.* at 13.

Having thus determined that Pennsylvania's statute, section 2776, infringes upon the fundamental right to vote, the court applied strict scrutiny review under which the statute could be upheld only if the Commonwealth showed that it advances a compelling state interest and is narrowly tailored to serve that interest. The Commonwealth proffered four state interests: limiting the names on the ballot, guarding against splintered parties and an unstable political system, preventing clogging of the election mechanism, and shortening the length of service of a non-elected Senator. The court held that the first three cannot justify the statute because they would apply

equally in general elections, for which Pennsylvania does provide a primary. The court recognized that at least the last of the state interests proffered had some merit, but it concluded that Pennsylvania's system was not narrowly tailored to serve that interest.

Finally, the district court reviewed the vacancy proviso of the Seventeenth Amendment authorizing the state legislature to empower the executive to make temporary appointments to fill the senatorial vacancy until the special election but reasoned that this proviso did not authorize the state legislature to commit what the court had already determined to be unconstitutional, *i.e.*, to permit the nominations for candidates to fill senatorial vacancies without conducting a popular primary. The court found it significant that the vacancy proviso specifies that "the people" must elect the new Senator. U.S. Const. amend. XVII.

The court concluded that although the Governor's temporary appointment of Senator Wofford is constitutional and that Trinsey could not be included as an independent candidate in the special election without meeting Pennsylvania's requirements for third-party candidates, section 2776 violates the Seventeenth and Fourteenth Amendments.

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 (1988). This court has jurisdiction over the appeal from the final decision of the district court issuing a declaratory judgment pursuant to 28 U.S.C. § 1291 (1988). The issue before us is one of law and our review is plenary.

III.

Discussion

A. *The Seventeenth Amendment*

Although the appellants, intervenors and amici curiae opposing the decision of the district court (referred to jointly as appellants) have filed numerous briefs, their principal position does not differ. Essentially, they argue that the district court erred in interpreting the Supreme Court precedent and the legislative history of the Seventeenth Amendment to hold that the Constitution requires Pennsylvania to hold a primary election to select candidates to fill an unanticipated vacancy in the office of United States Senator.

The district court relied primarily on the Seventeenth Amendment. The language itself, as the district court acknowledged, contains no reference to a primary election. The Seventeenth Amendment to the Constitution provides in relevant part that:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.
>
> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to

make temporary appointments until the people fill the vacancies by election as the legislature may direct.

Notwithstanding the lack of language referring to a primary, the district court discerned from the legislative history of the Seventeenth Amendment a congressional intent to treat "nomination as a part of the general electoral process," Typescript Op. at 8, and it was therefore "reluctant to hold that the framers of the Seventeenth Amendment were authorizing major political parties to choose their nominees without an election." *Id.* at 9. We do not believe the legislative history supports the construction placed upon it by the district court.

It must be remembered that under the original Constitution, the responsibility for selecting United States Senators was placed upon the state legislators. This proved to be a controversial provision. There were numerous attempts to change the method of selection, but they were aborted by the Senate until 1911 when the Senate's earlier hostility or indifference to a constitutional amendment was finally overcome. Among the reasons given for that chamber's change of heart were the increasing clamor of the overburdened state legislatures for the call of a constitutional convention to change the method of senatorial selection[6] and the receptivity to direct election by the growing number of United States Senators who themselves had been selected through some form of popular vote. *See* 1 G.

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6. The difficulties attendant upon the state legislature's selection of Senators are graphically set forth in R. Byrd, The Senate, 1789-1989, S. Doc. No. 100-20, 100th Cong., 1st Sess. 390-98 (1988) (Byrd).

Haynes, *The Senate of the United States* 106-08 (1960) (Haynes).

The district court placed great emphasis on the following paragraph from the Senate Report accompanying Senate Joint Resolution 134, the bill which was ultimately enacted as the Seventeenth Amendment:

> It should not be overlooked either that the election of Senators by popular vote would not only leave *the nomination and election* of the members of the legislature upon the simple issue of their fitness for that particular work, but it would place every candidate for the high place of Senator before the people, where his views and his relationship to the public interests of the State could be known and understood of all.

S. Rep. No. 961, 61st Cong., 3d Sess., 14 (1911) (emphasis added by the district court, Typescript Op. at 9).

The court interpreted this paragraph as demonstrating a legislative intent that the popular election requirement of the Seventeenth Amendment would apply to both the election *and the nomination* of United States Senators. When read in the context of the preceding discussion in the Senate Report, it seems clear that the reference to "the nomination and election of the members of the legislature" is not to the nomination and election of United States Senators, but to the nomination and election of the members of the *state legislature*.

The preceding four paragraphs of the Senate Report discuss what appears to be one of the key reasons for the passage of the Seventeenth

Amendment: the need to remove from the state legislatures the burden of selecting United States Senators, a process each state legislature had to undergo at least twice every six years.

The focus on that concern is evident from the following passage which appears in the Senate Report shortly before the one the district court quoted:

> It is believed that one of the great advantages to be gained by a change of the mode of electing Senators is that of leaving the State legislatures free and unembarrassed to attend to that legislation which the interests of the State require. It is frequently true that a senatorial election not only pushes aside all matters of local interest, in so far as the election of members to the legislature is concerned, but that it also occupies not only weeks, but sometimes months, or the entire session of the legislature, to the great detriment of the State's public business. Not only is legislation which ought to be had not had, public interests which ought to be cared for are not cared for, but charges of bribery arise and scandal attaches to the entire lawmaking department of the State.

Id. at 13.

Thus, the subsequent language in the Senate Report which was quoted by the district court, interpreted in this context, is that the popular election of United States Senators will "leave the nomination and election of members of the [state] legislature upon the simple issue of their fitness for that particular work [, *i.e.*, the enactment of state laws]," rather than upon the issue of their fitness for selecting a United States Senator.

The need to relieve the state legislatures of the burden of selecting United States Senators is reiterated throughout the floor debates. The Senators addressing the issue during the floor debates discussed three problems: (1) the selection of state legislators on the basis of their ability to fill seats in the United States Senate instead of their ability to enact state laws; (2) the diversion of the state legislatures' attention away from addressing the problems of their states; and (3) political corruption. *See* 46 Cong. Rec. 1104-05 (1911) (remarks of Sen. Borah); *id.* at 2256 (remarks of Sen. Beveridge).

It is true that there were several references made during the floor debates to the use of primary elections to achieve party nominations for the United States Senate. The district court referred to the statement by Senator McCumber that "[c]oincident, if not preceding this change of election of United States Senators, will be the nomination of senators by popular vote." That this was intended as a prediction of what might happen rather than a statement of what must happen is evidenced by Senator McCumber's next sentence: "This means *in most instances* a double campaign, first fought to a finish between the candidates of a particular party, and then between the successful candidates of opposing political parties." 47 Cong. Rec. 1881 (1911) (emphasis added). The references to primaries in the debates appear to be merely observations based on the then current trend toward the enactment of primary laws. *See id.* at 1886 (remarks of Sen. Borah); 46 Cong. Rec. 2257 (remarks of Sens. Owen and Beveridge); *id.* at 2259 (remarks of Sen. Beveridge).

The remarks of Senator Borah merit particular attention because he was the author of the Senate Report. In arguing against an amendment that would have enabled Congress to prescribe the electoral practices of the states, Senator Borah made clear that he believed that the precise mode of senatorial nomination and election was to be a purely local question and that establishment of a primary system was to be left to the states. He stated:

> [P]opular elections have come peculiarly to be matters of local arrangement. The manner of holding them has become essentially local. The trend of events and the logic of conditions have made them local. Each State has its primary or is coming to have. . . .
>
> . . . We will have intrusted to the State the sole power to determine, outside of the rule against discrimination, who shall vote for a Senator. We will have intrusted to the State to determine what kind of a man shall be sent here, save as to his age and citizenship. We will have intrusted to the people the power to directly choose Senators, and, sir, we will have intrusted to the voluntary action of the people of the State the sole power to determine whether they will elect a Senator at all . . . . Yet, after intrusting to the States and the people of the States all these substantial powers, we say they may nevertheless prove unfit to determine the manner of doing this; *that they may not be wise enough to say whether they want nominations by primary or by open conventions*; whether they want the Australian ballot or the open ballot; whether they want protected booths or unprotected booths.

47 Cong. Rec. 1886 (emphasis added).

There is no doubt that there was some sentiment among certain Senators in favor of primaries as the preferred method for nomination of senatorial candidates in order to counter what almost all of the Senators participating in the debate saw as the evils of party politics and the corrupting influence party bosses, caucuses, machine politicians, and ward heelers had on politics in general and senatorial elections in particular. Although some Senators opined that passage of the Seventeenth Amendment would bring the end of machine politics, 47 Cong. Rec. 1921-22 (remarks of Sen. Owen); *id.* at 1882 (remarks of Sen. McCumber); 46 Cong. Rec. 1106 (remarks of Sen. Borah), there is no firm evidence that they believed that they were tackling the political machines by mandating primaries as well as direct election of Senators.[7]

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7. The strongest statement, and it is hardly strong enough support for the district court's conclusion, was that of Senator Beveridge who attributed voter apathy to party control over nominations:

> . . So it comes to be said, and that, too, by intelligent people—and I am coming to the intelligence of the masses in a minute—"What is the use? The caucus fixes who is to be nominated; conventions, run by bosses, say who is to be nominated by both parties; I can not vote for whom I like; it will have no influence with the laws." That is the reason, Mr. President, why the people's voting is falling off.

Moreover, we should not overlook help gleaned from the debate on the Seventeenth Amendment in the House of Representatives. Particularly significant is the statement of Rep. Lenroot from Wisconsin who, in speaking against deletion of the clause in Article I, § 4 giving Congress the right to regulate national elections, commented that Congress might some day pass a law which guarantees to the people of every state "the right to nominate as well as elect." 47 Cong. Rec. 223 (1911).

Although we cannot find support in the legislative history of the Seventeenth Amendment for the district court's holding that it was intended to mandate primaries as well as the popular election of Senators, our inquiry need not be cast so broadly. The issue before us is limited to whether a primary is required to nominate a candidate to fill a senatorial vacancy. Senatorial

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> But where the people understand that they themselves can take part in legislation; that they themselves can vote for a Senator, for example; that they themselves under that system, which started in older countries than ours, can cast their vote upon a specific law, I observe that history shows that they come to the polls in greater abundance. Mr. President, if you want to encourage the negligence of the great privilege and duty of voting by the people just continue to take away from them more of their participation in government.

46 Cong. Rec. 2257. Even Senator Beveridge, however, spoke of the future to be ushered in by the Seventeenth Amendment in terms of the people's "vote for a Senator," which is fully consistent with a construction of the Seventeenth Amendment as limited to the election, rather than nomination of Senators.

vacancies are the province of the second paragraph of the Amendment, whereas the first paragraph deals with regular elections of Senators. It is surprising that there does not appear to have been any discussion in the floor debates as to how mid-term vacancies should be filled. Accordingly, even if there could be some legislative intent gleaned from the legislative history as to the necessity of primaries in a regular general election, we are given no guidance of the legislative intent as to the course to be followed in the present circumstance. It follows we must pursue other courses for guidance.

B. *The Supreme Court Precedent*

The district court's holding that the Seventeenth Amendment requires the popular election of party nominees rested not only on excerpts from the legislative history but also on its reading of two Supreme Court cases, *United States v. Classic*, 313 U.S. 299 (1941), and *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986). The district court's opinion suggests that *Classic* and *Tashjian* establish the proposition that the right to nominate candidates through primaries, like the right to vote in a general election, is a right secured by the Constitution. We read those cases differently.

In *Classic*, Louisiana election officials charged with willfully altering and falsely counting and certifying the ballots of voters cast in a primary election for a Representative to Congress were indicted under a federal criminal statute making it a crime to interfere with or deprive any citizen of any right or privilege secured by the Constitution. The defendants argued that the right

to vote in a primary was not a right secured by the Constitution. The Court assumed that in adopting Article I, § 2 providing that members of the House of Representatives shall be "chosen . . . by the People," U.S. Const. Art. I, § 2, cl. 1, the framers of the Constitution did not have specifically in mind selection by a direct primary. Nonetheless, it rejected the defendants' argument, holding instead that the right to have one's "vote counted in both the general election and in the primary election, where the latter is a part of the election machinery," is a right protected by the Constitution. 313 U.S. at 322. Nothing in *Classic* suggests that the Constitution requires the holding of primaries in the election of representatives. Instead, the Court emphasized that the Constitution gave the states "wide discretion in the formulation of a system" for electing representatives. *Id.* at 311.

The language of the opinion makes it clear that it was holding merely that if primaries are a part of the selection process they cannot be conducted in a manner inconsistent with the popular election mandate of the Constitution:

> Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted *at the primary* is likewise included in the right protected by Article I, § 2.

Id. at 319 (emphasis added).

We reach a similar conclusion about *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), upon which the district court relied heavily. The Republican Party in Connecticut,

which had adopted a rule which permitted independent voters to vote in Republican Party primaries for statewide and federal offices, challenged a Connecticut election law that required voters in primaries to be registered members of that party. The Supreme Court held the state law violated the Republican Party's First Amendment rights. In so holding, the Court rejected Connecticut's argument that the Party rule would violate the Qualifications Clauses contained in Article I, § 2 and the Seventeenth Amendment because it would allow persons to vote in the primaries for the federal offices who were not eligible to vote in the primaries for the most numerous branch of the state legislature. *See* U.S. Const. Art. I, § 2, cl. 1; U.S. Const. amend. XVII. There was no provision in the Party rule for independents to vote in the primaries for those offices.

Although the Court ultimately held that the fundamental purpose of the Qualifications Clauses is satisfied if all of those qualified to participate in the selection of members of the more numerous branch of the state legislature are also qualified to participate in the election of United States Senators and Representatives, 479 U.S. at 229, the district court seized upon the language the Court used before reaching that conclusion. The Court, in rejecting the Republican Party's argument that primaries were not subject to the Qualifications Clauses, stated that the fundamental purpose underlying the Qualifications Clauses "applies to the entire process by which federal legislators are chosen." *Id.* at 227. After noting that *Classic* had held the Qualifications Clauses apply to primaries as well as to general elections "where the state law

has made the primary an integral part of the procedure of choice," the Court stated, "[t]he constitutional goal of assuring that the Members of Congress are chosen by the people can only be secured if that principle is applicable to every stage in the selection process." *Id.* at 227. The district court relied on this "every stage in the selection process" language in finding that party nomination of candidates authorized by section 2776, a stage in the selection process, violates the popular election mandate of the Seventeenth Amendment.

Tashjian, like *Classic*, cannot support the district court's holding. It is clear from the context of the Supreme Court's "every stage" statement in *Tashjian* that it was referring to the holding of primary elections when one was required under state law. The statement which is at the heart of the district court's holding, put in its proper light, presupposes the holding of a primary. For the same reason, the district court's reference to the *White Primary Cases* (*Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927)) adds no additional authority because those cases, like *Tashjian* and *Classic*, are directed to the enforcement of constitutional norms in primary elections provided by state law rather than to the wholly distinct question whether the primary itself is mandated by constitutional law.

A more fundamental problem with the district court's reliance on *Tashjian* and *Classic* is that those cases involved regular general elections, whereas section 2776 is concerned only with the special election of a successor to a vacancy in a

Senate seat. The Seventeenth Amendment explicitly provides that "the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election *as the legislature may direct.*" (emphasis added). This vacancy proviso of the Amendment has been found to confer "a reasonable discretion upon the states concerning the timing and manner of conducting vacancy elections." *Valenti v. Rockefeller*, 292 F. Supp. 851, 866 (S.D.N.Y. 1968), *aff'd*, 393 U.S. 404, 405, 406 (1969).

In *Valenti*, New York voters challenged the provision of the state election law that Senate vacancies which arise less than 60 days before the regular spring primary be filled at the general election in the next even-numbered year. As a result of the timing of Senator Robert Kennedy's death, the interim appointee selected by the Governor of New York to fill the Senate vacancy would serve some 29 months. The plaintiffs argued that the Seventeenth Amendment gave authority for the Governor to make a temporary appointment as successor only until the vacancy can be filled by the people at the next regularly scheduled election, two years earlier than under state law.

The three-judge court in *Valenti*, summarily affirmed by the Supreme Court, rejected plaintiffs' argument that the Seventeenth Amendment compelled New York to adopt plaintiffs' proffered timetable for filling a Senate seat vacancy. Instead, the court held that the "natural reading" of the vacancy provision of the Seventeenth Amendment "grants to the states some reasonable degree of discretion concerning both the timing of vacancy elections and the procedures to be used in

selecting candidates for such elections." *Id.* at 856. The court found that New York's election procedure furthered substantial state interests and was thus not an abuse of the discretion granted to the states by the Amendment. The interests included, *inter alia*, the state's belief that voter interest and turnout is greater in "even-numbered years" when congressional elections are held. *Id.* at 859.

Valenti represents the converse of the situation before us, but the court's analysis is fully applicable here. An election under the *Valenti* plaintiffs' timetable would have required the nominees for the vacancy to miss a primary and to have been selected by the committees of the political parties. *Id.* at 862. The court characterized "[t]he choice" as being "between securing a prompt decision by the people between the nominated candidates, and delaying that decision in order for the people to participate directly in the nominating process." *Id.* at 862. The court held that "the drafters and ratifiers of the Seventeenth Amendment believed[] that this type of choice between election procedures is best left to the discretion of the states when there are substantial interests which will be served by either alternative." *Id.*

The discretion conferred upon states in developing the procedure for filling a vacancy was also discussed in *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982), in which the Court held that a Puerto Rico statute which authorized a vacancy in the Puerto Rico legislature to be filled by the political party to which the former member belonged did not violate the United States Constitution. Appellants in *Rodriguez* had argued

that the process for filling vacancies was constitutionally defective because it did not provide for a special election to fill the vacancy and because the interim successor was appointed by a political party rather than an elected official. Although *Rodriguez* did not raise a federal election question, the Court analogized the claim in *Rodriguez* to the one raised in *Valenti* under the Seventeenth Amendment. The *Rodriguez* Court expressly relied on *Valenti* when it stated: "the fact that the Seventeenth Amendment permits a state, if it chooses, to forgo a special election in favor of a temporary appointment to the United States Senate suggests that a state is not constitutionally prohibited from exercising similar latitude with regard to vacancies in its own legislature." *Id.* at 11.

The interim appointment procedure, the Court said, "serves the legitimate purpose of ensuring that vacancies are filled promptly, without the necessity of the expense and inconvenience of a special election. The Constitution does not preclude this practical and widely accepted means of addressing an infrequent problem." *Id.* at 12.

C. *Concluding Analysis*

In sum, we have found nothing in the legislative history of the Seventeenth Amendment or in the Supreme Court cases relied upon by the district court which supports a conclusion that a state is constitutionally bound to hold a primary for nominations to fill a senatorial vacancy, either because it has a procedure for primaries in general elections or because it has given political parties some role in the nomination process. The available precedent suggests that the Supreme Court views

the manner in which the nominees are selected to have been left to the discretion of the states. *See American Party of Texas v. White*, 415 U.S. 767, 781 (1974) ("It is too plain for argument that the State may . . . insist that intraparty competition be settled before the general election by primary election *or by party convention*." (emphasis added)).

The language of the vacancy provision supports that view. There was a strong contingent in Congress in 1911 that was committed to states' rights and was resistant to any change that would decrease the power and authority of the states and enlarge that of the federal government. *See* Byrd, at 400-01; Haynes, at 110-11. Although this group was defeated in its efforts to couple the direct election of Senators with the deletion of the constitutional provision in Article I, § 4, cl.1, giving Congress the authority to make or alter the states' provisions as to the times and manner of holding elections for Senators and Representative, *see* Byrd, at 400-02, the explicit provision in the vacancy paragraph of the Seventeenth Amendment vesting discretion in the state legislatures not once, but twice, cannot have been without significance. Not only does the proviso state that the state legislature "may" empower the executive to make temporary appointments but, in language which itself could be deemed dispositive of the issue before us, it also states that those interim appointments will continue until filled by an election "as the legislature may direct." U.S. Const. amend. XVII.

The growing trend toward the use of primaries in the years leading up to the passage of the Seventeenth Amendment had by no means become universal. Haynes, at 99-104. Indeed, in the

decades following the Amendment's passage, the primary system was still in a stage of early development, and was the subject of much criticism, including the charge that it was anti-democratic. *See* Haynes, vol. 2, at 1070-83. The absence of any reference to a primary election in the Seventeenth Amendment is therefore not surprising.

Once we conclude that the Seventeenth Amendment does not mandate that Pennsylvania conduct a primary before holding a general election to fill a senatorial vacancy, it follows that there is no fundamental right that is infringed by the Pennsylvania statute at issue. Thus, there is no basis for the district court to have applied a strict scrutiny standard of review over Pennsylvania's decision that candidates in the unusual situation of a senatorial vacancy either must be nominated by political parties or must file nomination papers signed by the requisite number of voters. *See* 25 Pa. Stat. Ann. §§ 2776, 2911, 2912, 2914. Instead, *Rodriguez* counsels us to apply a more deferential standard of review over a state's choice of the manner in which to fill legislative vacancies. *See* 457 U.S. at 12 (whether the "system plainly serves [a] legitimate purpose").

Using this standard of review, it is plain that Pennsylvania's scheme in selecting nominees for Senatorial vacancies is acceptable. The Attorney General of the Commonwealth argues that Pennsylvania's statute serves the interests of "filling vacancies promptly, avoiding unnecessary expense and inconvenience, minimizing the time in office of an unelected Senator, and maximizing voter participation in choosing a successor." Brief of Commonwealth of Pennsylvania at 18. In

Rodriguez, the Supreme Court characterized Puerto Rico's decision to fill vacancies in its legislature by appointment by the political party with which the previous incumbent was affiliated as a "practical and widely accepted means of addressing an infrequent problem." 457 U.S. at 12. Pennsylvania's system, which minimizes the time in office of an unelected Senator, cannot be any less acceptable.

We do not discount the argument of Professor Little that "the people" can exercise the most meaningful choice over their representatives "only if there is popular control of the nomination process." Brief of Amicus Curiae Little at 9. However, that is an argument that must be addressed to the legislature, which has been given the discretion by the Seventeenth Amendment to direct the manner in which the vacancy election is to be conducted. The legislature is free to decide that it is not in the interests of the state to require that a special primary, with its attendant expense for the state and the candidates, be held before the special election when, as in the tragic circumstances of Senator Heinz's death, the vacancy occurs too late to be filled in the usual spring primary. Just as the decision of the New York legislature in similar circumstances to hold primaries in June, instead of September, and to have senatorial vacancies filled at the same election as that for Representatives was considered reasonable, so also must Pennsylvania's decision that the interests of its voters will be best accommodated by giving them an opportunity to express their preference as to representation in a special election as promptly as possible, without an intervening primary.

It is ironic, although apparently overlooked by the parties, that Pennsylvania's original statute enacted immediately after the ratification of the Seventeenth Amendment did provide for primaries in connection with the election to fill a senatorial vacancy. *See* 1913 Pa. Laws No. 454, § 3 ("Whenever a vacancy shall happen in the representation of this Commonwealth in the Senate of the United States, the said vacancy shall be filled, for the unexpired term, by the vote of the electors at a special election held at the time of the next general election whose antecedent primary occurs at least sixty days after the happening of such vacancy, and it shall be the duty of the Governor to issue writs of election accordingly."); *see also Valenti*, 292 F. Supp. at 860 ("Only one statute, that of Pennsylvania, specifically provided that the candidates [in a vacancy election] were to be selected through a primary procedure."). Whatever the reason for Pennsylvania to have changed that procedure in 1937, *see* 25 Pa. Stat. Ann. § 2776 (1963), we must accord the state's decision, undoubtedly "passed in response to the state's actual experience in these matters," *Valenti*, 292 F. Supp. at 866, to be "a permissible exercise of [its] discretion." *Id.*

We take no position on the balancing of the respective interests in this situation. That is a function for which the legislature is uniquely fitted. If the voters of the state are unhappy with the legislature's decision, then the democratic process gives them ample opportunity for redress.

IV.

The Fourteenth Amendment

The district court held that section 2776 violated the Fourteenth Amendment as well as the Seventeenth Amendment.

Relying upon precedent that primary votes must be weighed equally, the court stated that "[b]ecause the statute allows parties to make distinctions that deny him his right to vote, Trinsey has an equal protection claim as a voter." Typescript Op. at 15 & n.10. Of course, Pennsylvania's statute, unlike those considered by the Supreme Court in the White Primary Cases, does not allow some people to vote in a primary and deny that opportunity to others. All of Pennsylvania's citizens are deprived of the opportunity to vote in a vacancy primary.

The inequality to which the district court was referring was that occasioned by the disenfranchisement of Trinsey, and the other political party members of both parties for whom he purports to speak, in the selection of the political party's nominee, a privilege given under the rules of the major political parties to the members of the Parties' state committees. Although Trinsey has made an eloquent plea on behalf of those who wish their voices to be heard and counted in that selection, the Supreme Court's decision in *Rodriguez* is dispositive of the equal protection claim. In light of the *Rodriguez* holding that the Equal Protection Clause was not violated by a system which excluded independents and persons affiliated with parties other than that of the deceased incumbent from voting in the by-election to fill the vacant seat, 457 U.S. at 10,

14, we cannot find any Equal Protection violation in Pennsylvania's decision to leave the nomination procedure to Party rules that in effect disenfranchise the Party's members.[8]

V.

Conclusion

The foregoing discussion makes inevitable our conclusion that the district court's judgment that Pennsylvania's statute, 25 Pa. Stat. Ann. § 2776 (1991), is unconstitutional cannot stand. In so holding, we acknowledge the commitment in time, effort and energy made by the *pro se* plaintiff, John S. Trinsey, Jr., to the process by which this case of first impression was brought into the judicial process and thereby to public attention and debate. It is in that arena, in the last analysis, that the result that he desires must ultimately be decided.

For the reasons set forth above, we will reverse the judgment of the district court, and remand with directions to enter judgment for the defendants. The mandate shall issue forthwith. Each party is to bear its own costs.

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8. In light of our decision, we need not decide whether a Party's choice of its nominee through internal party procedures is state action within the meaning of the Fourteenth Amendment, an issue raised in the brief of Intervenors-Appellants Specter *et al.*.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing. Phila., Pa. 215-568-4264)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-1490 and 91-1491

JOHN S. TRINSEY, JR.

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, BOARD OF ELECTIONS, THE GOVERNOR, SECRETARY OF THE COMMONWEALTH

ARLEN SPECTER, ANNE ANSTINE, WILLIAM H. LAMB, ELSIE HILLMAN, HERBERT BARNESS, THE REPUBLICAN STATE COMMITTEE OF PENNSYLVANIA,

Intervenors in DC

PENNSYLVANIA DEMOCRATIC STATE COMMITTEE, LAWRENCE J. YATCH, WILLIAM K. MYRTETUS, DON WALKO, BILLIE JO HERR and ANTHONY J. MAY,

Intervenors

Intervenors, Senator Arlen Specter, Anne Anstine, William H. Lamb, Elsie Hillman, Herbert Barness, and the Republican Committee of Pennsylvania,

Appellants in No. 91-1490

Department of State of the Commonwealth of Pennsylvania, Governor Casey and Commonwealth Secretary Christopher A. Lewis,

Appellants in No. 91-1491

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil No. 91-02479)

PRESENT: SLOVITER, Chief Judge, GREENBERG and SEITZ, Circuit Judges

JUDGEMENT

This cause came on to be heard on the record from the United States District of Pennsylvania and was argued July 15, 1991.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered June 11, 1991, be, and the same is hereby reversed and the cause is remanded to the said District Court with direction to enter judgment for the defendants. It is further ordered that the mandate of this court shall issue forthwith. Each party to bear its own costs. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Sally Mervos
Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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ATTEST:
/s/ Sally Mervos
Clerk

August 6, 1991

Certified as a true copy and issued in lieu of a formal mandate on August 6, 1991

Test: /s/ Sally Mervos

Clerk, United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Nos. 91-1490 and 91-1491

JOHN S. TRINSEY

vs.

COMMONWEALTH OF PA, et al.

It is ORDERED that the motion for recall of the mandate is DENIED because no substantive right of the applicant will be affected by failure to grant the recall of the mandate. This is without prejudice to the applicant's right to file a timely petition for writ of certiorari.

/s/ Dolores K. Sloviter
Chief Judge

Dated: Aug 13 1991

RECEIVED AND FILED

8 - 13 - 91
SALLY MERVOS
Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-1490 and 91-1491

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Appellants in No. 91-1490

Department of State of the Commonwealth of Pennsylvania, Governor Casey and Commonwealth Secretary Christopher A. Lewis,
Appellants in No. 91-1491

SUE PETITION FOR REHEARING

APPENDIX "E" App. 59

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and NYGAARD, Circuit Judges

The petition for rehearing filed by Appellee John S. Trinsey, Jr.

in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
/s/ Dolores K. Sloviter
Chief Judge

Dated: Aug 15 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN S. TRINSEY, JR.	:	CIVIL ACTION
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, BOARD OF ELECTIONS, THE GOVERNOR and SECRETARY OF THE COMMONWEALTH	:	No. 91-2749

OPINION

CAHN, J. June 10, 1991

This case arose after the tragic death of Senator John Heinz on April 4, 1991 created a vacancy in Pennsylvania's representation in the United States Senate. The pro se plaintiff, John S. Trinsey, Jr., seeks a determination pursuant to 42 U.S.C. § 1983[1] that 25 Pa. Cons. Stat. Ann. § 2776

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[1] 42 U.S.C. § 1983 provides, in relevant part, Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or (continued...)

violates the Seventeenth Amendment to the United States Constitution.

Section 2776, which governs the special election of United States Senators, provides, in relevant part,

> Whenever a vacancy shall occur in the office of United States Senator, said vacancy shall be filled for the unexpired term by the vote of the electors of the state at a special election to be held at the time of the next general or municipal election, occurring at least ninety (90) days after the happening of such vacancy .... candidates to fill vacancies in the office of United States Senator shall be nominated by political parties, in accordance with the party rules relating to the filling of vacancies, by means of nomination certificates ....

The plaintiff has filed a motion for a

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1. (... continued) immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress . . . .

Temporary Restraining Order and a motion for a Preliminary Injunction. He also seeks, pursuant to 28 U.S.C. § 2201, a declaratory judgement that the statute is unconstitutional.[2] The Commonwealth has filed a memorandum opposing injunctive relief and has moved to dismiss the case. The court held a hearing on the matter on May 29, 1991.

I. BACKGROUND

This plaintiff challenges the manner in which the Commonwealth of Pennsylvania fills vacancies in its Senatorial representation. The Seventeenth Amendment itself provides:

> When vacancies happen in the representation of any

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[2] This court, construing the plaintiff's pleadings liberally, concludes that when he requests that the court set aside § 2776 as unconstitutional, see Complaint at 6, Trinsey is actually seeking a declaratory judgment that the statute is unconstitutional pursuant to 28 U.S.C. § 2201.

> State in the senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

Pennsylvania's legislature has directed that the two major political parties may choose, according to party rules, the nominees who will run in the general election. Both major parties nominate by party committee.

The plaintiff, who challenges the law as a Republican voter and as a potential Republican candidate, [3] focuses his attack on the nomination procedure for party

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[3] Trinsey has standing to sue both as a voter and as a prospective candidate. See Gray v. Sanders, 372 U.S. 368, 375 (1963) (any person whose right to vote is impaired has standing to sue); Anderson v. Celebrezze, 460 U.S. 780 (1983) (independent candidate challenging Ohio's ballot access laws).

candidates.[4] As a potential candidate, Mr. Trinsey complains that the statute operates to deny him an opportunity to participate in the Republican primary. As a voter, the plaintiff contends that this statute violates the Seventeenth Amendment to the United States Constitution because it "plac[es] the power to elect [a] Senator not in the hands of the People of Pennsylvania but rather in hands of small groups of Republican and Democratic Party Committee

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[4] Originally, Trinsey also challenged the constitutionality of that portion of § 2776 providing that the Governor shall temporarily appoint a Senator and sought to enjoin Senator Wofford's appointment. Because the Seventeenth Amendment specifically provides for temporary appointments, the court denied the injunction at the hearing. The court also dismissed Trinsey's challenge to ballot access requirements imposed on independent candidates by the Commonwealth. Pennsylvania's requirements comply with constitutional norms identified by the Court in ballot access cases. See generally Anderson v. Celebrezze, 460 U.S. 780 (1983); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); American Party of Texas v. white, 415 U.S. 767 (1974); Store v. Brown, 415 U.S. 724, reh'g denied, 417 U.S. 926 (1974).

members." Answer to Motion to Dismiss at 1. The Commonwealth defends its law on the grounds that it protects valid and compelling state interests in protecting the integrity of the electoral process and limiting the term of an appointed Senator. Additionally, Pennsylvania argues that it has no constitutional duty to hold a primary election.

The Eleventh Amendment does not bar this action because the plaintiff is seeking declaratory and injunctive relief only. Edelman v. Jordan, 415 U.S. 651 (1974); Ex Parte Young, 209 U.S. 123 (1908); see also Melo v. Hafer, 912 F.2d 628, 635 n.5 (3d Cir. 1990), cert. granted 111 S. Ct. 1617 (1991). Moreover, civil rights plaintiffs may pursue Section 1983 claims for injunctive relief against state officials sued in their official capacity. Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 n.10 (1989); Melo, 912 F.2d at 635. The

court will therefore turn to the merits of the plaintiff's claim.

II. DISCUSSION

A. The Right to Vote

The right to vote for Representatives and Senators has its foundation in the qualifications clauses of Article I and the Seventeenth Amendment. The Seventeenth Amendment provides that the Senatorial "electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures." U.S. Const. Amend. XVII, §1.[5] Article I contains an identical clause establishing the qualifications of the electors of the House of Representatives. U.S. Const. Art.I, §2, cl.1.

Citizens of the United States therefore undeniably have a right to vote

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[5] The original Constitution provided for election of Senators by state legislatures, U.S. Const, Art. 1, cl. 3.

for their national representatives. See United States v. Classic, 313 U.S. 299, 314, reh'g denied, 314 U.S. 707 (1941) ("The right of the people to choose ... is a right established and guaranteed by the Constitution"); see also Kauffman v. Osser, 321 F. Supp. 327, 333 (E.D.PA. 1971) (right to vote for members of Congress fundamentally based on Qualifications Clauses in the Constitution). It is well established that the right to vote is fundamental, see, e.g., Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979); Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Evans v. Cornman, 398 U.S. 419, 422 (1970); Kramer v. Union Free School Dist., 395 U.S. 621, 626 (1969); Williams v. Rhodes, 393 U.S. 23, 31 (1968); Katzenbach v. Morgan, 384 U.S. 641, 654 (1966); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 667 (1966); Wesberry v. Sanders, 376 U.S. 1, 17 (1964);

Gray v. Sanders, 372 U.S. 368, 380 (1963); Classic 313 U.S. at 315; Burdick v. Takushi, 927 F.2d 469, 473 (9th Cir. 1991), and is protected against private as well as state interference. See Classic, 313 U.S. at 314-15; Ripon Soc'y v. National Republican Party, 525 F.2d 567, 599 (D.C. Cir. 1975) (Tamm, J. concurring); see also Developments in the Law-Elections, 88 Harv. L. Rev. 1111, 1158-59 (1975).

Furthermore, because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement ... must be carefully and meticulously scrutinized." Reynolds v. Sims, 377 U.S. 533, 562 (1964). As the Court stated in Wesberry, supra,

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the

right to vote is undermined.

376 U.S. at 17.

The issue before this court, whether the right to vote must be protected at the nomination stage, has not been squarely presented before. It is clear that the states could choose to run general elections [without] the prior selection of major political party nominees by primary or otherwise. See Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 218 (1986) (states could for administrative and financial reasons eliminate selection of major party nominees).

Pennsylvania, however, has chosen to have the major parties make nominations prior to the general election. Because the choice of party nominees plays a central role in determining the eventual electoral outcome, the question of whether those no nominees must be chose democratically is a valid one. See Moore v. Ogilvie, 394 U.S.

814, 818 (1969) ("[a]ll procedures used by a State as an integral part of the election must pass muster against charges of discrimination or of abridgment of the right to vote."). In addressing this issue, the court will consider the history and language of the Amendment itself, as well as analogous Court precedent.

B. The Seventeenth Amendment and the Nomination Process

The introduction in Congress of resolutions proposing a constitutional amendment to accomplish popular election of Senators began in 1825. During the early 1870's, members of the House rapidly increased the frequency with which they introduced such resolutions. Although the House repeatedly voted overwhelmingly in favor of such resolutions, the Senate resisted the change. In fact, the proposed amendment did not come to a vote in the Senate until 1911. 1 G. Haynes, The Senate

of the United States 96-7 (1960). Thus, achieving popular election of Senators was no mean task; only after pressure for a constitutional convention grew did the Senate respond to the desire for popular election. See Sherman, The Recent Constitutional Amendments, 23 Yale L.J. 129, 146 (1913).

Most citizens were dissatisfied with the original manner of Senatorial election for numerous reasons. See generally, G. Haynes, supra, at 85-95. However, the ability of political party leaders to control the Senatorial choice was a major motivation for reform. Those party managers had a "phenomenal skill in the manipulation of legislators ... out of all proportion to [their] hold upon the voters." 1 G. Haynes, supra, at 93.[6] One purpose of the

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[6] A contemporary observer described one instance of party manager dominance as follows,

> On January 14 (1887), the (continued ...)

Amendment, therefore, was to wrest control of the Senate from small elite groups who controlled the political parties. See, e.g., 46 Cong. Rec. 2253 (1911) (statement of Sen. Beveridge) (popular election will correct situation whereby party managers choose Senators); 46 Cong. Rec. 1106 (1911) (statement of Sen. Borah) (framers of Constitution, when providing for states to elect Senators, did not foresee problems of

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6. (... continued) Republican members of the Legislature of New York met in caucus and selected their candidate to succeed Mr. D.B. Hill. The most eminently qualified man in the State of New York (the Hon. Joseph H. Choate) was duly presented to the caucus. No other names were presented or mentioned. There are 151 Republican members of the present state legislature. A vote was taken, and seven members were found to be in favor of Mr. Choate. All the rest, with a notable exhibition of spontaneity, declared themselves in favor of Thomas C. Platt. A few days later Mr. Platt was formally elected. Review of Reviews, (February 1887) (cited in 1 G. Haynes, supra, at 93).

dominance of party leaders).

Moreover, the Senate Report accompanying S.J. Res. 134, which eventually became the Seventeenth Amendment, treats nomination as a part of the general electoral process:

> It should not be overlooked either that the election of Senators by popular vote would not only leave the nomination and election of the members of the legislature upon the simple issue of their fitness for that particular work, but it would place every candidate for the high place of Senator before the people where his views and his relationship to the public interests of the State could be known and understood of all. There is nothing more important in the matter of selecting public officers than of having the candidate take into his confidence those whom he is to represent prior to the time that the certificate of election is issued.

S. Rep. No. 961, 61st Cong., 3d. Sess. 14 (1911) (emphasis added); see also 47 Cong.

Rec. 1881 (1911) (statement of Sen. McCumber) (coincident with popular election will be nomination by popular vote). Given this history, the court is reluctant to hold that the framers of the Seventeenth Amendment were authorizing major political parties to choose their nominees without an election.

Furthermore, the Court has emphasized the importance of primary elections in other contexts. In cases arising under the First, Fourteenth, and Fifteenth Amendments, the Court has recognized that the Constitution guarantees the franchise at all stages of the electoral process, including the nomination stage. The court will now turn to a discussion of that line of cases.

C. A Right to Nominate?

The Court first announced that nomination procedures are an integral part of the electoral process in Classic:

> Where the state law has made the primary an

> integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by [the Constitution]. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery .... Moreover, we cannot close our eyes to the fact already mentioned that the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election even though there is no effective legal prohibition upon rejection at the election of the choice made at the primary and may thus operate to deprive the voter of his constitutional right of choice.

313 U.S. at 318-19.

Thus, the right to vote "must be recognized in any preliminary election that in fact determines the true weight a vote

will have." Gray, 372 U.S. at 380 (citing Classic and Smith v. Allwright, 321 U.S. 649 (1944)). For the foregoing reasons, the Court has held that primary elections must comply with all Constitutional provisions applicable to general elections. See Gray v. Sanders, supra (one person-one vote rule); Nixon v. Herndon, 273 U.S. 536 (1927) (equal protection clause); Nixon v. Condon, 286 U.S. 73 (1932) (equal protection clause); Smith v. Allwright, 321 U.S. 649, reh'g denied, 322 U.S. 769 (1944) (Fifteenth Amendment); Terry v. Adams, 345 U.S. 461, reh'g denied, 345 U.S. 1003 (1953) (Fifteenth Amendment); cf. Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 223 (1989) (free discussion about candidates no less protected before primary than before general election).

In Nixon v. Herndon, Nixon v. Condon, Smith v. Allwright, and Terry v. Adams (the "White Primary Cases"), the Court explicitly

recognized the importance of voter access to the nomination process.[7] In Smith, the Court noted that Classic "fus[ed] primary and general elections into a single instrumentality for choice of officers." 321 U.S. at 660. Therefore, after Classic, "it can now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution." 321 U.S. at 661-62.[8]

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[7] The White Primary Cases established that a state can neither statutorily exclude blacks from primary elections nor delegate the authority to conduct a primary to a private association which discriminates against blacks.

[8] Classic and the White Primary Cases admittedly arose in states where, at the time, the nomination of the Democratic candidate determined the Congressional representative. See, e.g., Terry, 345 U.S. at 469 (opinion of Black, J.) (general election no more than perfunctory ratifier of the choice made at election from which blacks were excluded); Classic, 313 U.S. at 313-14 (continued ...)

The Commonwealth's reliance on the statement in Classic that "the framers ... did not have specifically in mind the selection and elimination of candidates for Congress by ... direct primary," 313 U.S. at 315-16, is unavailing. Classic immediately qualifies that statement by observing, "in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that is one with which the framers were not familiar." 313 U.S. at 316.

Moreover, Classic involved an interpretation of Article I. The framers of the Seventeenth Amendment, unlike the framers of the original Constitution, were

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8. (... continued) (partial operation of Democratic primary in Louisiana was to secure election of Democratic nominee). Tashjian, however, clearly applies the same principle to states in which either party could win the election. Thus, the significance of the right to vote in a primary does not hinge on the existence of a "one-party state."

quite familiar with the primary system. At the time of the Amendment's passage, many states used the direct primary to choose Senators who were then formally elected by the legislature. See 1 G. Haynes, supra, at 99-101.

The Commonwealth argues that, although the Constitution applies to primaries when they are held, it does not require the states to conduct primaries. The court agrees with the proposition that a state may choose to forego the primary system. Pennsylvania could choose to have an election without party nominees begin selected, by primary or otherwise, before the general election. Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 218 (1986) establishes that states may choose to eliminate the nomination process for administrative or financial reasons. However, Tashjian does not stand for the proposition that, if the state adopts a

system whereby the political parties choose nominees, that system does not have to comply with the Constitution.

Pennsylvania has adopted such a system. The nomination of Democratic and Republican Senatorial candidates is indisputably an integral part of the electoral process. Moreover, it is clear that the choice of political party committees will not always reflect the preferences of party members. Because of the importance of the choice of nominee, precedent requires popular participation at the nomination stage.[9]

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[9] A holding that Pennsylvania must conduct a primary to determine that candidates of the Democratic and Republican parties is not inconsistent with a state system by which parties with differing levels of support nominate their candidates by different methods. See American Party of Texas v. White, 415 U.S. 767 (1974). The states may take reasonable measures to regulate their electoral processes. The Texas statute attached in American Party provided that each political party that cast at least 200,000 votes for governor in the preceding general election had to nominate by primary. (continued ...)

Tashjian clearly states that popular election mandated by the Seventeenth Amendment applies not only to primaries but to "the entire process by which federal legislators are chosen [and t]he constitutional goal of assuring the Members of Congress are chosen by the people can only be secured if that principal is applicable to every stage in the selection process." Tashjian, 479 U.S. at 227 (emphasis added); cf. Durkin v. National Bank of Olyphant, 772 F.2d 55,58 (3d. Cir. 1985) (Higginbotham, J.) (in civic elections, federal law recognizes that access to the candidate selection process is a component of constitutionally mandated

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9. (... continued) Pursuant to the statute, parties with less support nominated either by convention or by petition. This regulation is reasonably calculated to ensure that any candidate likely to succeed in the general election will have been nominated by a popular vote. Likewise, this holding does not prohibit the political parties from ensuring that nominees running in their primaries have at least minimal support.

voting rights).

Finally, the conclusion that logically follows from Classic and the White Primary Cases undercuts the Commonwealth's argument that it can allow political parties to choose nominees without complying with the Qualifications Clause. The "place of the primary in the electoral scheme" played a central role in the Court's decisions in earlier cases. See, e.g., Smith, 321 U.S. at 660 (recognizing the unitary character of primary and general elections in electoral process); see also Terry, 345 U.S. at 469 (opinion of Black, J.) (noting that the private Jaybird primary had become the only part of the electoral process in which voters could vote effectively). Primaries are not significate merely because the states chose to use them, but rather because of their function, that is, nominating candidates from the major political parties. Under the Pennsylvania law, the party

committees perform the nomination function, and they perform that function undemocratically. "Constitutional rights would be of little value if they could be thus indirectly denied." Smith, 321 U.S. at 664.

D. Constitutional Scrutiny of Pennsylvania's Law

Based upon the foregoing discussion, this court concludes that Pennsylvania's statute infringes upon the right to vote, a fundamental right. Accordingly, the law must be carefully scrutinized. Eu, 489 U.S. at 222.

The political parties, acting pursuant to § 2776, have adopted rules that allow party committee members to vote for a nominee while denying the vote to everyone else.[10] Only the votes of committee

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[10] The White Primary Cases establish that when a state delegates authority to political parties to perform public functions, such as nomination of candidates, the actions of the parties (continued ...)

members carry any weight in the nomination process. In an apportionment case, the Court has observed that primary votes must be weighted equally:

> All who participate in the [primary] election are to have an equal vote -- whatever their occupation, whatever their income, and whatever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of "the people" under the Constitution visualizes no preferred class of voters but equally among those who meet the basic qualifications.

Gray, 372 U.S. at 379-80. Because the statute allows parties to make distinctions that deny him his right to vote, Trinsey has an equal protection claim as a voter. Trinsey, as a prospective candidate, complains that the law denies him the opportunity to compete in a Republican

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10. (... continued) are equivalent to state action for the purpose of equal protection analysis. See also L. Tribe, American Constitutional Law § 13-25, at 1126 (1988).

primary and therefore abridges his First and Fourteenth Amendment rights.

Because Pennsylvania's law burdens the plaintiff's fundamental rights, it can survive constitutional scrutiny only if the Commonwealth shows that it advances a compelling governmental interest and is narrowly tailored to serve that interest. Eu, 489 U.S. at 225; Moore, 394 U.S. at 818; Harper, 383 U.S. at 67 (quoting Reynolds, 377 U.S. at 561-62) ("where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined"); see also Consumer Party of America v. Davis, 633 F. Supp. 877, 890 (E.D.Pa. 1986).

In defense of § 2776, Pennsylvania identifies four state interests served by the statute. First, the law limits the number of names on the ballot. Second, it

guards against splintered parties and an unstable political system. Third, it prevents clogging the election mechanism. Fourth, it shortens the length of service of a non-elected Senator.

The states have broad latitude in regulating access to the ballot, see Smith, Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply, 28 Harv. J. Leg. 167 (1991), and the first three interests proffered by the Commonwealth justify regulations that limit ballot access. However, Pennsylvania conducts primaries for regular elections and has not explained why a vacancy primary presents a greater threat to its interests than these normal primary elections. Therefore, the asserted state interests cannot justify a direct infringement of the right to vote secured by the Seventeenth Amendment. Nor can they justify the unequal weight afforded to party committee members' votes at the

nomination stage.

Pennsylvania's fourth argument in support of § 2776 is its strongest. A sudden vacancy in Pennsylvania's representation in the Senate admittedly creates exigent circumstances. The concededly valid state interest in shortening the term of the non-elected Senator would be only minimally burdened by the running of a primary election, however.[11] Additionally, Pennsylvania has not narrowly tailored its law to serve the Commonwealth's interest. Allowing political parties to adopt rules conferring the power of nomination on elite members of party committees is a drastic measure. Indeed, only two other states address the exigencies

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[11] For example, in a case such as this one, Pennsylvania could have a fall primary and spring election, thereby extending the appointee's term by only a few months.

of a Senatorial vacancy with such abandon.[12] The Court has observed that a state carries an extra burden in defending a practice that is exceptional and burdens a fundamental right. See Eu, 489 U.S. at 226 (noting that California had not explained what made its electoral system so unique that it was virtually the only state to employ a ban on primary endorsements). Pennsylvania has not carried that burden.

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[12] See Colo. Rev. Stat. §§1-12-101, 1-4-401, 1-4-402; Mont. Code Ann. § 13-25-202.

Under the same circumstances, eighteen states provide for primary elections. See Ariz. Rev. Stat. Ann. § 16-201; Haw. Rev. Stat. § 17-1; La. Rev. Stat. Ann. §§ 18:1278, 18:402(E); Md. Elec. Code Ann. § 21-1; Mass. Ann. Laws. ch. 54, § 139; Nev. Rev. Stat. Ann. § 304.010; N,M, Stat. Ann. § 1-15-14; Ohio Rev. Code Ann. § 3513.32; S.D. Codified Laws Ann. § 12-11-5; Vt. Stat. Ann. § 2621; Wash. Rev. Code Ann. § 29.68.080; W. Va. Code § 3-10-3; Wis. Stat. § 8.50(4)(b). See Alaska Stat. §§ 15.40.080, 15,40.090, 15.40.110, 15.40.120; Ind. Code § 3-10-8-7; Or. Rev. Stat. § 188.120; Tex Elec. Code Ann. § 202.004.

The remaining states make no mention of the nomination process. The court has been unable to find any cases discussing the actual operation of statutes that do not provide for a nomination process.

In conclusion, although Pennsylvania has an interest in limiting the terms of non-elected Senators, it may not achieve its goal by abridging the fundamental rights of its citizens. Eu, 489 U.S. at 222; Tashjian, 479 U.S. at 217. A state may not, for the sake of expedience, delegate authority over the election process to political parties who then violate the constitutional rights of the citizens of that state. See Smith, 321 U.S. at 644 (constitutional right to be free from radical discrimination in voting not to be nullified by a state through casting of electoral process in a form which permits a private organization to practice discrimination); cf. Tashjian, 479 U.S. at 218 (state cannot restrain party's freedom of association for reasons of administrative convenience). Therefore, unless the vacancy provision of the Seventeenth Amendment authorizes Pennsylvania to address the

exigencies of a vacancy without complying with the Constitution, the statute cannot survive constitutional scrutiny.

E. The Vacancy Proviso

The Seventeenth Amendment provides that, in case of vacancy, "the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct." One could argue that the final clause, "as the legislature may direct," allows the state broad latitude in conducting vacancy elections. In fact, the Commonwealth cites Valenti v. Rockefeller, 292 F.Supp. 851 (W.D. & S.D.N.Y. 1968), aff'd, 393 U.S. 405, reh'g denied, 393 U.S. 1124 (1969), for the proposition that the Seventeenth Amendment confers "a reasonable discretion upon the States concerning the timing and manner of conducting vacancy elections." 292 F.Supp. at 866.

The Amendment, although it confers reasonable discretion upon the states, does not authorize unconstitutional acts by state legislatures. The Amendment very specifically grants the Governor the power to make a temporary appointment, thereby sanctioning an otherwise unconstitutional act. By contrast, the same proviso merely makes a general grant of power to the legislature, without authorizing that branch of government to act outside of constitutional norms. Furthermore, the proviso specifies that "the people" must elect the new Senator.

In sum, this court declines to read a general grant of regulatory power as authorization for the Pennsylvania legislature to avoid the Constitution. Although the Commonwealth has reasonable discretion, that discretion "does not extinguish [its] responsibility to observe the limits established by [the

Constitution]." Eu, 489 U.S. at 222 (citing Tashjian, 479 U.S. at 217)); Burdick, 927 F.2d at 472. This is especially true here, since the framers of the Amendment clearly knew how to provide for an otherwise unconstitutional act. By its own language, the Amendment authorizes the Governor to make a temporary appointment. The legislature, however, must provide for popular election of the new Senator. The Amendment does not authorize an election that infringes upon the fundamental right to vote of Pennsylvania's citizens. The statute cannot stand.

III. CONCLUSIONS OF LAW

1. This court has jurisdiction of this action pursuant to 28 U.S.C. § 1331;

2. The governor's temporary appointment of Senator Wofford is constitutional;

3. The Commonwealth of Pennsylvania has no duty to include the plaintiff as an

independent candidate on the November 5, 1991 ballot in the general election unless the plaintiff meets Pennsylvania's requirements for third-party candidates; and

4. Pa. Cons. Stat. Ann. § 2776 operates to violate the Seventeenth and Fourteenth Amendment rights of Pennsylvania's voters and is therefore unconstitutional.[13]

BY THE COURT:

/s/ Edward N. Cahn
Edward N. Cahn, J.

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[13] No injunctive relief can be granted against the Democratic and Republican state committees because they are not parties to this action.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN S. TRINSEY, JR.	:CIVIL ACTION
	:
v.	:
	:
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, BOARD OF ELECTIONS, THE GOVERNOR and SECRETARY OF THE COMMONWEALTH	:
	:No. 91-2749

ORDER

CAHN, J. June 10, 1991

AND NOW, upon consideration of the record herein, IT IS ORDERED that

1. the plaintiff's motion for a Temporary Restraining Order to enjoin the appointment of Senator Wofford is DENIED;

2. the plaintiff's motion for a Preliminary Injunction to enjoin the appointment of Senator Wofford is DENIED;

3. the defendants' Motion to Dismiss is DENIED; and

4. the plaintiff;s request for a

declaratory judgment is GRANTED. This Court declares 25 Pa. Cons. Stat. Ann. § 2776 unconstitutional because is operates to abridge the right to vote of the citizens of the Commonwealth of Pennsylvania.

ENTERED: 6/11/91

CLERK OF COURT

BY THE COURT:
/S/ Edward N. Cahn
Edward N. Cahn, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN S. TRINSEY, JR.	:	
	:	
v.	:	CIVIL ACTION NO.
	:	91-2749
COMMONWEALTH OF PENNSYLVANIA, et al.	:	

FILED AUG - 9 1991

ORDER

AND NOW, this 7th day of August, 1991, in accordance with the opinion of the Court of Appeals for the Third Circuit filed August 6, 1991, IT IS ORDERED that the prior judgment order in the within case is RESCINDED and judgment is ENTERED in favor of all defendants and against John S. Trinsey, Jr.

BY THE COURT:

/s/ Edward N. Cahn
Edward N. Cahn, J.

ENTERED: 8/9/91
CLERK OF COURT

APPENDIX "H" App. 97